IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE MAGNAVOX COMPANY ET AL, Plaintiffs, v. CHICAGO DYNAMIC INDUSTRIES, INC. ET AL, Defendants.	)	CONSOLIDATED CIVIL ACTIONS NOS. 74 C 1030 74 C 2510

NOTICE OF MOTION

TO: THEODORE W. ANDERSON, ESQ.
JAMES T. WILLIAMS, ESQ.
Neuman, Williams, Anderson & Olson
77 West Washington Street
Chicago, Illinois 60602

EDWARD C. THREEDY, ESQ.
Threedy & Threedy
111 West Washington Street
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PLEASE TAKE NOTICE that on Wednesday, October 20, 1976, at 2:00 o'clock P.M., or as soon thereafter as counsel may be heard, the undersigned shall appear before the Honorable John F. Grady, or any Judge sitting in his stead, in the courtroom usually occupied by him, at 219 South Dearborn Street, Chicago, Illinois, and then and there present the attached motion.

Melvin M. Goldenberg

Melvin M. Goldenberg
William T. Rifkin
McDOUGALL, HERSH & SCOTT
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Attorneys for The Seeburg Companies and World Wide Distributors, Inc.

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MOTION FOR LEAVE TO TAKE DISCOVERY

The defendants hereby move this Honorable Court for leave to take discovery of RCA Corporation and certain of its employees, whose identities are not known at this time, at Princeton, New Jersey.

Accompanying this motion is a memorandum in support thereof and the affidavit of Melvin M. Goldenberg, one of the attorneys for the Seeburg defendants and World Wide Distributors, Inc.

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DEFENDANTS' MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR LEAVE TO TAKE DISCOVERY

INTRODUCTION

In this action plaintiffs are charging defendants with infringement of Patent No. 3,659,284 and its Reissue No. Re.28,507 and Patent No. 3,659,285 and its Reissue No. Re.28,598. The defendants in addition to denying any infringement of those patents also contend that they are invalid as being anticipated in accordance with the provisions of 35 U.S.C. § 102, and/or "obvious" in accordance with the provisions of 35 U.S.C. § 103.

By order of the Court, discovery in this case was closed as of October 1, 1976, and the parties were ordered to be ready for trial on November 1, 1976.

The Court's order closing discovery and setting a trial date was entered on June 9, 1976 after Civil Action

No. 75 C 3153 had been dismissed upon the Court being advised that the defendant in that case had compromised its differences with the plaintiffs herein, and a consent judgment was entered in Civil Action No. 75 C 3933 which disposed of a related case between Atari Incorporated and the plaintiffs herein involving the same patents.

Since the Court's order of June 9, 1976, as set forth in the affidavit of Melvin M. Goldenberg accompanying this motion, the defendants have exerted every reasonable effort to prepare this case for trial. This preparation has included an extensive and time consuming review of the lengthy record of these and the related civil actions, a large quantity of patents and other possible prior art referred to at one time or another by the parties who have been terminated from these and the related cases in one way or another. In addition, defendants have undertaken substantial discovery, including one deposition, the preparation of document requests, interrogatories and requests for admission. In connection with the last mentioned activity it should be noted that it was necessary for the defendants to devote time to a motion under Rule 37 and to participate in proceedings before Magistrate Balog in order to compel responses to certain requests for admission.

This effort resulted in defendants' ability to serve, on October 1, 1976, the notice of prior art upon

which the defendants intend to rely as required by the provisions of 35 U.S.C. § 282.

At that time defendants believed that within the time and resources available to them they had made the best investigation possible and had winnowed from the large body of material available to them the prior art upon which they would rely to prove the invalidity of the patents in suit.

THE NECESSITY FOR THE PRESENT MOTION

On October 18, 1976 defendants' attorneys met with plaintiffs' attorneys in order to comply with the request of this Honorable Court that counsel confer before trial in a genuine effort to stipulate to facts.

At the opening of that meeting the defendants' attorneys were presented with copies of the letter attached to this memorandum as an exhibit.

As may be seen, the letter advises defendants' attorneys that one of the plaintiffs had become aware, to some degree, of certain activities on the part of RCA Corporation in September of 1967.

As set forth in the affidavit of Melvin M. Goldenberg, he undertook on the afternoon of that day to make inquiries by telephone of RCA as to what was involved.

After talking by telephone with Mr. John Reagan, a patent attorney employed by RCA at its laboratories in

princeton, New Jersey, as set forth in the affidavit, Melvin M. Goldenberg called Mr. James Williams and relayed to him the information that he had received and advised Mr. Williams that it appeared to him that the activities of RCA were most relevant to the invalidity issues in this case and that they were not merely cumulative of other prior art upon which the defendants were going to rely. As further set forth in that affidavit, Melvin M. Goldenberg and James Williams explored the possibility of entering into a stipulation with respect to the activities of RCA. Mr. Williams communicated to Mr. Goldenberg on the morning of October 19, 1976 that the plaintiffs in good conscience did not see how they could enter into a stipulation with respect to this matter as they knew little or nothing about the information communicated to Mr. Williams by Mr. Goldenberg.

At this time the position of the plaintiffs is quite understandable to the defendants as the information presently available is not complete and has been communicated to the parties by persons at RCA, who are not known to have direct knowledge of the events. Therefore, it is believed necessary to provide time for the defendants to undertake discovery with respect to the RCA activities in September of 1967.

Inasmuch as RCA is not a party to this litigation it will be necessary to take the deposition of a knowledgeable person or persons by subpoena and to subpoena such documents and things as may be relevant to the matter. At this time the defendants do not know the identities of any person or persons having direct knowledge of these activities, and have no knowledge of their availability. If this Court grants this motion the defendants will undertake immediately to arrange for a notice of deposition and appropriate subpoenas and attempt to commence and complete the desired discovery during the week beginning October 25, 1976.

At the completion of that discovery defendants will, if they deem it necessary to the presentation of their case on invalidity, move this Court for leave to offer proof with respect to the RCA activity. This motion is not made for the purpose of delay but is made because the defendants, on the basis of information presently available to them, that the RCA activity is most pertinent to the validity issues in this case and, as stated, is not merely cumulative.

CONCLUSION

It is believed that defendants' motion should be granted for the reasons stated and on the basis of the facts shown.

Respectfully submitted,

Melvin M. Goldenberg

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October 18, 1976

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Re: Magnavox v. CDI

Gentlemen:

On Thursday, October 14, representatives of Magnavox visited Princeton, New Jersey to discuss with RCA Corporation certain matters concerning the patents in suit and U.S. Pat. 3,728,480. During that meeting RCA brought to the attention of Magnavox a pool game which was supposedly played on a computer at RCA. We understand that there is a film of the game which was supposedly shown at the 25th anniversary of an RCA research laboratory on either September 28 or 29, 1967.

As we understand it, the game used a vector-type display. The player touched a symbol representing a cue ball with a light pen which caused the symbol to move toward representations of other balls. The balls appeared to bounce off of each other and disappeared when they reached a pocket area.

RCA also referred to two United States patents during the meeting, Nos. 2,896,109 and 3,019,289.

We thought that this information should be brought to your attention as soon as possible.

Very truly yours,

NEUMAN, WILLIAMS, ANDERSON & OLSON

By Theodcre W. Anderson

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AFFIDAVIT OF MELVIN M. GOLDENBERG

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, Melvin M. Goldenberg, being duly sworn, do hereby state:

I am a member of the Bar of this Court and one of the attorneys for the defendants, Seeburg Industries, Inc., The Seeburg Corporation of Delaware, Williams Electronics, Inc. and World Wide Distributors, Inc.

On October 18, 1976 I received by hand a letter directed to me and Edward C. Threedy, Esq. from Mr. Theodore W. Anderson, one of the attorneys for the plaintiffs. A copy of this letter is attached to the Memorandum in Support of Defendants' Motion for Leave to Take Discovery, which this affidavit accompanies.

Following the receipt of Mr. Anderson's letter there was a discussion between the counsel for the parties

in the course of which I advised counsel for the plaintiffs that it looked as though it would be necessary for defendants to investigate this matter and possibly file a motion for leave to take discovery.

In the same discussion Mr. Anderson gave the defendants' attorneys the names of several people at RCA who might be contacted in connection with this matter.

Upon my return to my office in the early afternoon of October 18, 1976 I called a Mr. Gene Cooper at RCA's patent licensing operation in New York City.

In my telephone conversation with Mr. Cooper I identified myself and stated my reason for the interest in the matter. After some discussion Mr. Cooper advised me that he would consult with his superiors and others in RCA and he or somebody else would be calling me back.

Later in the afternoon I received a telephone call from a Mr. John Reagan, who identified himself as a patent attorney for RCA at its laboratories in Princeton, New Jersey.

Mr. Reagan told me that the activity involved was a celebration of the 25th anniversary of RCA's Sarnoff Research Laboratories in Princeton, New Jersey, which was in the form of an open house to which members of the families

of RCA employees and the public in the vicinity of Princeton, New Jersey, were invited.

He further told me that at that open house there were a number of demonstrations, one of which involved the playing of a game of pool on the screen of a cathode ray tube by the use of a computer. He told me that the game displayed on the tube included the display of the sides of a pool table in which there were pockets. The game also included the display of balls, including a cue ball which was set into motion and hit other balls which were displayed. The balls would appear to bounce off each other and would disappear when they entered a pocket.

Mr. Reagan also told me that a sound motion picture film had been made of the game, that the film was later shown on television in the Princeton, New Jersey, area.

I told Mr. Reagan that as I presently understood what he was telling me that this activity was most relevant to the issue of validity of the patents in suit in these cases, and that if defendants were unable to obtain a stipulation from the plaintiffs with respect to them and were able to obtain leave of Court that defendants would have to take discovery of RCA to develop the facts, whatever they may be. Mr. Reagan stated that he understood that and agreed that inasmuch as RCA is not a party to this matter its documents and its people would have to be subpoenaed in connection with such discovery.

In its notice of prior art served upon the plaintiffs on October 1, 1976, the defendants have advised that it is their intention to rely upon a pool game played on a cathode ray tube using a computer at a facility of the University of Michigan in 1954.

On the basis of information presently available to the defendants it would appear that the events at RCA involved at least two elements which are different from the University of Michigan pool game. The first is the RCA game as presently understood included the actual display on the screen of the cathode ray tube of the sides and pockets of a pool table. In the University of Michigan pool game these elements were not displayed but were apparently provided on the face of the cathode ray tube using some kind of marking device. Secondly, it is entirely possible that the plaintiffs will contend for various reasons that the University of Michigan pool game was not a public use in accordance with the patent statutes. It is believed that the RCA pool game can unquestionably be shown to be a public use amounting to a statutory bar in particular accordance with provisions of 35 U.S.C. §§ 102(b) and 103.

Therefore your affiant concludes that the evidence sought to be elicited by discovery is not cumulative of evidence already available to them, and it is your affiant's belief that it is most pertinent to the validity issues in these cases.

Until the defendants' attorneys were advised by Mr. Anderson, through his letter of October 18, 1976, of the possibility of the RCA activity, your affiant believes none of the defendants' attorneys had any knowledge of the same. This is so in spite of what your affiant believes had been the substantial efforts made since June in connection with preparing this case for trial.

These efforts have involved a review of the very extensive files accumulated by parties who have been defendants in one of these and related cases. The efforts have also included a review and study of a considerable body of prior art available in those files and from other sources. In addition your affiant believes that the defendants have been diligent in their efforts to complete necessary discovery in these cases. None of these efforts yielded any information about the RCA activities.

Your affiant has communicated all of the information in his possession at this time to James Williams, Esq., one of the attorneys for the plaintiffs. This was done in part to see if a stipulation could not be worked out. Plaintiffs' attorneys after considering this matter do not believe they can enter into a stipulation now because of the incomplete character of the information presently available and perhaps for other reasons.

It is the intention of your affiant to proceed promptly to undertake the discovery sought and to insure that the defendants do all that they can to avoid delay in the trial of this case.

Melvin M. Goldenberg

Subscribed and sworn to before me this 19th day of October, 1976.

Dolores C. Sharko
Notary Public